Supreme Court, U.S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-343

SUN SHIP, INC.,
Appellant

V.

COMMONWEALTH OF PENNSYLVANIA WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ JOSEPH C. KIMMEL and WILLIE MOORE,
Appellees

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR AMICUS CURIAE

Patrick N. McTeague
McTeague, Higbee & Tierney
169 Park Row, P.O. Box 340
Brunswick, Maine 04011

Counsel for Local No. 6,
Industrial Union of Marine
and Shipbuilding Workers
of America, AFL-CIO

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE LONGSHOREMEN'S ACT CONTAINS NO "CLEAR AND MANIFEST" INTENT TO DISPLACE THE POLICY POWERS OF THE STATE	1
II. THE 1972 AMENDMENTS DID NOTHING TO ALTER THE "TWILIGHT ZONE" AND CONCURRENT JURISDICTION DOCTRINES	6
III. A FINDING OF FEDERAL PREEMPTION WILL PRODUCE UNNECESSARY DELAY IN WORKMAN'S COMPENSATION PROCEEDINGS AND DENY MARITIME EMPLOYEES A POTENTIALLY MORE FAVORABLE STATE REMEDY	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Baskin v. Industrial Accident Commission, 338 U.S. 854 (1949)	4
Bethlehem Steel v. Moores, 335 U.S. 874 (1948)	4
Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962)	4,5,9,12
Davis v. Department of Labor and Industry, 317 U.S. 249 (1942)	2,3
Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922)	2
Hahn v. Ross Island Sand and Gravel Co., 358 U.S. 272 (1959)	4
Nations v. Morris, 483 F.2d 577 (CA 5 1973)	5
Rice v. Sante Fe Elevator Corp. 331 U.S. 218, 230 (1947)	1
Ryan Stevedoring v. Pan-Atlantic, 350 U.S. 124	7
Tibbetts v. Bath Iron Works Corp. 10 BRBS 245	16

Table of Authorities (Cont'd.)

Statutes — Page

Maine Workers' Compensation Act
Title 39 M.R.S.A. §1, et seq..... 16

Title 39 M.R.S.A. §56-A..... 16

Title 39 M.R.S.A. §100..... 17

Longshoremen's and Harbor Workers' Compensation Act,
33 U.S.C. §901, et seq..... 1

33 U.S.C. §903(a)..... 9

33 U.S.C. §905(a)..... 6,8

33 U.S.C. §921..... 14

References

A. Larson, Workmen's Compensation Law,
Vol. 4, §89.25..... 3,9

A. Larson, Workmen's Compensation Law,
Vol. 4, §89.70 at 16-284..... 3

Gilmore and Black, Law of Admiralty,
(2d Ed. 1975) at 425... 3,5,11,13,14

Table of Authorities (Cont'd.)

Miscellaneous — Page

Hearings before Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, p.190-191.....8

3 U.S.C.A. Congressional and Administrative News (1972, 4698, 4707..... 10

I. THE LONGSHOREMEN'S ACT CONTAINS NO "CLEAR AND MANIFEST" INTENT TO DISPLACE THE POLICE POWERS OF THE STATE

The case law dealing with federal preemption of states' rights has been exhaustively analyzed in the briefs submitted by the private parties in this matter, as well as the amicus briefs submitted by the Solicitor of Labor and the United States Solicitor General. The Appellant is alone in its belief that the Longshoremen's Act, 33 U.S.C. §901 et seq., requires such preemption.

In this Court's prior decisions analyzing preemption issues, the Court begins "with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). It is respectfully submitted that the Appellant has failed to demonstrate

conclusively any such "clear and manifest" purpose so as to defeat the application of state law.

It cannot be seriously contested that at least since this Court's 1942 decision in Davis v. Department of Labor and Industry, 317 U.S. 249 (1942), there has been concurrent state and federal jurisdiction over injuries sustained by land-based maritime workers occurring in the "twilight zone".

The Davis Court faced the jurisdictional issues in the context of fifteen years of experience under the Longshoremen's Act. During those years there was a seemingly endless stream of litigation in which courts struggled mightily to define the precise contours of the "maritime but local" doctrine in which this Court had ruled state workmen's compensation statutes could validly be applied. Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922).

Leading commentators have characterized that period as one full of "horrors"

in which "workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located." Gilmore and Black, Law of Admiralty, (2d Ed. 1975) at 425. Others have written that courts during this early period were faced with the "tedious task of sorting out endless cases as falling on one side or another of the federal jurisdictional boundary." A. Larson, Workmen's Compensation Law, Vol. 4, §89.70 at 16-284.

This Court used the Davis case as a means "to call a halt to the time-consuming and expensive process of fighting each close case through the appellate hierarchy." Larson, supra, at §89.25. The Davis Court officially recognized that there was a "shadowy area [twilight zone] within which at some undefined and undefineable point, state laws can validly provide compensation." 317 U.S. at 253 (1942).

For the 30 years following Davis this Court consistently upheld the application of the "twilight zone". In fact, the doctrine of concurrent state

and federal jurisdiction was extended to uphold state remedies for injuries in areas which had previously been considered within exclusive federal jurisdiction. See Bethlehem Steel v. Moores, 335 U.S. 874 (1948); Baskin v. Industrial Accident Commission, 338 U.S. 854 (1949), and Hahn v. Ross Island Sand and Gravel Co., 358 U.S. 272 (1959).

In this Court's landmark decision in Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), the assertion of concurrent jurisdiction was clear and unequivocal:

> "Congress brought under the coverage of the Longshoremen's Act all [such injuries] whether or not a particular injury might also have been within the constitutional reach of a state's workmen's compensation law." 370 U.S. at 117. (emphasis added)

The Appellant in the instant case candidly acknowledges that Calbeck "was read as creating an area of concurrent jurisdiction where both state and federal law may operate," but questions whether

this result is compelled. Appellant's Brief, p. 34. Courts of Appeals and commentators, both before and after the 1972 Amendments, have had no such questions. In Nations v. Morris, 483 F.2d 577 (CA 5 1973), the Court reviewed this Court's jurisdictional decisions and commented that in Calbeck "the Supreme Court made it clear that there existed an area in which both state and federal compensation systems were competent to provide a remedy."

Thus, for 30 years, from 1942 to 1972, this Court upheld the "twilight zone" doctrine of concurrent jurisdiction which, according to Professors Gilmore and Black:

> "Seems to have worked reasonably well. Indeed a theory of concurrent jurisdiction seems to be the only sensible way of dealing with state and federal statutes which meet at some vaguely defined line." Gilmore and Black, Law of Admiralty, (2d Ed. 1975) at 425.

II. THE 1972 AMENDMENTS DID NOTHING TO ALTER THE "TWILIGHT ZONE" AND CONCURRENT JURISDICTION DOCTRINES

The Appellant contends the 1972 Amendments "wiped the slate clean" by eliminating the need for concurrent jurisdiction. Appellant's Brief at p. 38. It is respectfully submitted that a careful review of those amendments reveals no such intention or effect.

The Appellant relies heavily on the exclusive remedy provision of the Act, 33 U.S.C. §905(a) and concludes "Congress' intent to preempt state law can hardly be more clearly expressed." Appellant's Brief, pg. 24. However, as the Appellees correctly note in their Motion to Dismiss, this language was part of the Act prior to the 1972 Amendments at a time when concurrent jurisdiction was consistently being upheld. (Motion of Appellees to Dismiss Appeal at 3-4.) Thus, this provision can provide no basis to conclude the 1972 Amendments "wiped the slate clean".

The legislative history of the 1972 Amendments demonstrates that considerable attention was focused during committee deliberation on recent decisions of this Court which permitted "circuitous" actions by injured employees against their stevedoring employers. See Ryan Stevedoring v. Pan-Atlantic, 350 U.S. 124. The comments made to the committee by Ralph Hartman (now Director of the Office of Workers' Compensation Programs, which administers the Longshoremen's Act) are illustrative:

> "Thus, despite the express provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act that the Act is the exclusive remedy of an employee against his employer, stevedores and ship repair yard contractors are required to pay damages to their employees, over and above compensation payments, with the shipowner acting as a legally constituted conduit.
>
> There is a logical basis for the granting of immunity to a shipowner subjected to a liability due to an unseaworthy condition solely created by a stevedore or ship repair yard

> contractor. In these cases the circuity of action arises with the result that the stevedore and ship repair yard contractor have a dual liability. Clearly this is a situation that is contrary to the original intent of the exclusive remedy provisions of the Longshoremen's Act and, because of the greatly added burden it places upon stevedores and ship repair yard contractors, should be corrected....
>
> The re-establishment of the exclusive remedy provision of the Act can, with due regard for our employees, be accomplished by removing the warranty of seaworthiness as a basis for determining the liability of ships and shipowners..." Hearings before Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, p. 190-191.

It is only in this context -- Congressional concern over circuity of actions -- that any changes in the effects of Section 905 must be evaluated. Nowhere in the legislative history is there any suggestion that Section 905 after 1972 required preemption of state laws when it had not done so before.

Appellant discusses in some detail the alleged import of Congress' 1972 deletion of the phrase in Section 903(a) conditioning Longshoremen's Act coverage "if recovery...may not validly be provided by State law." To the Appellant:

> "Congress could only be certain of the amended Act's exclusive application to land-based injuries...if it elimated the language suggesting the possibility that state law could provide a remedy to injured maritime workers as well". Appellant's Brief, p. 37.

It is noteworthy that the Appellant provides no reference to the legislative history in support of its interpretation of Congressional intent on this point.

There is an equally plausible and logical explanation for Congress' deletion of the former proviso to Section 903(a). As leading commentators have noted, this Court's decision in Calbeck had already deleted this phrase by judicial construction. See Larson, supra, at §89.25. In the absence of any "clear and manifest" explanation of Congress' action

in this regard, it is equally valid to presume that Congress was simply bringing the statutory language into conformity with previous judicial construction.

Finally, the Appellant supports its preemption theory by reference to the following statement in the Senate report:

> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land." 3 U.S.C.A. Congressional and Administrative News (1972), 4698, 4707, cited in Appellant's Brief at p. 41.

The importance of that isolated remark in the committee reports has been seriously questioned by Professors Gilmore and Black:

> "It may not be entirely clear that the offhand reference to state laws in the passage

quoted was meant to mean that LHCA was to displace state compensation acts with respect to the land injuries to be brought within the LHCA coverage. However, even if that was the intended meaning, the statement does not appear to be entitled to much weight. The part of the Committee Report which is devoted to the shoreward extension of LHCA coverage does not so much as mention the pre-1972 case case law on 'maritime but local' and the 'twilight zone' which we have discussed in the preceding section. (By way of contrast the part of the Report which is devoded to the abolition of the recovery for unseaworthiness by LHCA workers goes into detail about the Supreme Court cases which are to be struck down.) It may be that the writer of the Report mistakenly assumed that the LHCA had always provided the exclusive compensation remedy for injuries which occurred on navigable waters and consequently assumed that it would also be exclusive with respect to the land injuries newly covered by the amendments." Gilmore and Black, supra, at 425.

It strains credulity to believe that Congress could have intended the sweeping

changes suggested by the Appellant without so much as a single reference to the Calbeck decision.

III. A FINDING OF FEDERAL PREEMPTION WILL PRODUCE UNNECESSARY DELAY IN WORKMAN'S COMPENSATION PROCEEDINGS AND DENY MARITIME EMPLOYEES A POTENTIALLY MORE FAVORABLE STATE REMEDY

If this Court finds the Longshoremen's Act to be a maritime employee's exclusive remedy, there is a real danger that the Courts will find themselves once again faced with the "tedious" task of deciding jurisdictional issues on a case-by-case basis. From the standpoint of judicial economy, such a prospect is frightening. As Professors Gilmore and Black note:

> "If the LHCA is taken to be exclusive up to its new territorial limits, injured maritime workers will have to guess at where the new line (piers, wharves and so on which 'adjoin' navigable waters) is located just as such workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located. Eventually the Supreme Court would no doubt find the resulting situation

> intolerable, and would rescue us once again by establishing a new theory of concurrent jurisdiction. But there seems to be no good reason why we should be condemned to relive the depressing episode of the 1927-1942 'maritime but local' LHCA case law. Gilmore and Black, supra, at 425.

If this Court reverses its prior findings of concurrent jurisdiction the injured maritime employee may well find himself with no remedy at all, simply because he has unknowingly chosen the wrong forum in which to pursue his claim. If the employee files his claim under the Longshoremen's Act, he may successfully persuade an Administrative Law Judge that he falls within the Longshoremen's Act's coverage. The Employer may then appeal that decision to the Benefits Review Board. 33 U.S.C. §921. The Benefits Review Board may uphold the finding of coverage. The employer may then file yet a further appeal to the United States Court of Appeals. That court may reverse the Benefits Review Board and find no coverage. By that time, the statute of limitations under the applicable state

law will almost certainly have expired, leaving the employee with no remedy. This scenario would be unacceptable and would violate the basic underpinnings of workmen's compensation law -- to provide a speedy and equitable remedy for all work-related injuries. Obviously, the opposite but parallel prospect -- innumerable appeals through state courts followed by the expiration of the federal statute of limitations -- is equally unacceptable.

The only way in which an injured employee will be able to protect his rights if this Court finds preemption will be to file and process claims under both acts simultaneously. This too will place injured employees in an intolerable position.

The Appellees in the instant case have asked this Court to allow them to pursue the more favorable state remedy available to them. Shipyard workers in Maine find themselves in much the same position as these Appellees. Even a cursory review of the Maine Workers'

Compensation Act, Title 39 M.R.S.A. §1 et seq., demonstrates there are several situations in which it provides a more favorable remedy than its federal counterpart.

First, in many areas the benefit levels are superior under Maine law. For instance, the Longshoremen's Act contains no provision for payment of scheduled loss for permanent impairment to a claimant's back, whereas under Maine law he may receive up to 200 weeks compensation. 39 M.R.S.A. §56-A.

Second, the Benefits Review Board has ruled that any payments a claimant receives for a scheduled loss are to be credited against any continuing partial compensation to which he may be entitled. See Tibbetts v. Bath Iron Works Corp., 10 BRBS 245. Under Maine law there is no such setoff and a claimant may receive both forms of compensation without reduction.

Third, the procedural safeguards for claimants is superior under Maine law.

Once an employee is receiving total disability benefits under Maine law, the burden of proof is shifted to the Employer to demonstrate a change in condition. An employee's benefits may not be summarily terminated until he is afforded a hearing before the Workers' Compensation Commission. 39 M.R.S.A. §100. There is no such protection under the Longshoremen's Act.

Fourth, and perhaps most important, the Maine Act can be much more easily and effectively administered than the Longshoremen's Act. Partially because there is no branch of the Office of Workers' Compensation Programs in Maine, partially because of the massive Office of Workers' Compensation Programs workload, claimants under the Longshoremen's Act must wait many months before they are even able to obtain a hearing under the Longshoremen's Act. This rarely occurs under the Maine Act, where hearings are scheduled easily, promptly and on a regular basis.

CONCLUSION

Under pre-1972 law there was clearly concurrent jurisdiction over land-based maritime employees. Had it chosen to do so, Congress could have altered this doctrine by express statutory amendment backed by substantive legislative history. Neither express language nor legislative history supports any alteration. It is respectfully submitted that any judicial construction finding federal preemption is unsupported by either statute, case law, or sound public policy. Indeed, a finding of preemption would plunge this court back to the pre-twilight zone era of endless litigation. In a time when the Court is gravely and properly concerned with its caseload, such a spectre is ominous.

As stated in the Motion for Leave to File this Amicus Curiae Brief, Local No. 6 of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, has many members whose working day requires them to cross the line of jurisdiction which the Appellant proposes

several times each day. Those employees should not be forced to guess at each moment which side of the line they work on. To guarantee those employees a certain, expeditious and equitable remedy, it is respectfully requested that the Decision of the Supreme Court of the Commonwealth of Pennsylvania be affirmed in full.

Dated: March 21, 1980

Respectfully submitted,

Patrick N. McTeague

Patrick N. McTeague, Esq.
McTeague, Higbee & Tierney
169 Park Row, P.O. Box 340
Brunswick, Maine 04011

Counsel for Local 6, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and thirty-nine copies of the within Amicus Curiae Brief have been served in hand this date to the United States Supreme Court. In addition, copies of said Amicus Curiae Brief have been served this date by Special Delivery, United States mail, to Jeffery C. Hayes, Esq., Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, PA 19109, Counsel for the Appellant; Joseph Lurie, Esq., Galfand, Berger, Senesky, Lurie & March, 1737 Chestnut Street, Suite 1200, Philadelphia, PA 19103, Counsel for the Appellees; Joshua Gillelan, Esq., Office of the Solicitor, Department of Labor, Suite N-2716, NDOL, Washington, D.C., 20210; and Allan Horowitz, Esq., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530.

Dated: March 21, 1980

Patrick N. McTeague

Patrick N. McTeague, Esq.